MBf PROPERTY SERVICES SDN BHD

v.

MADIHILL DEVELOPMENT SDN BHD (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-60-1996]
24 DECEMBER 1997

TORT: *Trespass to land - Continuing trespass - Knowledge - Whether necessary - Notice and liability - Special damage - Whether needs to be proved - Construction of access road on another's land - Mandatory injunction as remedy*

TORT: *Nuisance - What constitutes - Test for - Reasonableness - Balance between rights of parties to enjoyment of land - Construction of permanent access road across another's land - Mandatory injunction as remedy*

CIVIL PROCEDURE: *Injunction - Mandatory injunction - Principles in granting of - Differences with interlocutory injunction - Prepetual injunction - Specific Relief Act 1950, s. 52 - Use of mandatory injunction as remedy for trespass and nuisance*

The plaintiff was the manager and the lawful attorney for the registered proprietors of several pieces of industrial land in Johor ('Zone 1 and Zone 2'). Zone 1 and Zone 2 were developed by the plaintiff into factory lots for sale. The defendant's land ie, Lot PTD 26138, was located in between the two zones. To enable free access and free flow of traffic between the two zones for the convenience of its purchasers, the plaintiff constructed a stretch of road right across the defendant's land ('the access road'). The defendant barricaded the access road by erecting concrete bollards thus obstructing access and thorough fare between the two zones.

The plaintiff sought, *inter alia*, a mandatory injunction against the defendant to remove the concrete bollards and to restrain the defendant from obstructing the plaintiff from having free access and thorough fare through the access road. The plaintiff's case was that the construction of the access road was in accordance with the plans approved by the authorities.

The defendant counterclaimed that the construction of the access road across its land constituted a trespass and a nuisance, both of which were still continuing and sought from the court, *inter alia,* a perpetual prohibitory injunction to restrain the plaintiff from encroaching onto and/or using the access road and also a mandatory injunction that the plaintiff do reinstate the defendant's land to its original condition.

The issue before the court was whether the vertical dotted lines on Lot PTD 26138 in the plans were in law and in fact a road reserve for a road to be built on ground level cutting vertically across the said lot.

Held:

[1] Trespass to land is the unjustifiable intrusion by one person upon the land in possession of another. The slightest crossing of the boundary is sufficient to constitute trespass. Every continuance of a trespass is a fresh trespass and in respect of which a new cause of action arises from day to day so long as the trespass continues and persists.

[2] It is wrong to assume that no one can be liable for trespass unless he has notice that he is trespassing. The trespasser is liable whether he knows that he is trespassing or does not know that he has no right in law to be there. Trespass is actionable *per se* without any proof of special damage.

[3] The Majlis Daerah Johor Bahru ('MDJB') should not have approved the road and the MRT on the defendant's land for two reasons. Firstly, the defendant as the owner of the land had not submitted any plans for earthworks, roads and drainage. In fact the MDJB did not even know that Lot PTD 26138 did not belong to the plaintiff who submitted the plans for approval. Secondly, it was apparent that the MDJB had wrongly assumed that the vertical dotted lines along Lot PTD 26138 was a road reserve on ground level.

[4] Nuisance means undue interference with the use and enjoyment of land. In determining the question of whether a nuisance has been caused, one must strike a balance between the right of one party to use his property for his own lawful enjoyment and the right of the other party to the undisturbed enjoyment of his property. There can be no precise or universal formula, but a useful test will be what is reasonable according to the ordinary usages of mankind living in a particular society.

[5] On the facts, there was nuisance occasioned by the plaintiff onto the defendant by the construction of the access road on the defendant's land. That nuisance was permanent as the plaintiff had contemplated the access road to service the purchasers of both zones. The access road was not made of gravel but was tarred.

[6] A mandatory injunction is based on a final determination of the rights of the parties and is to permanently prevent the infringement of those rights and obviate the necessity of bringing actions after actions in respect of such infringements. Mandatory injunctions have more serious consequences on the parties than interlocutory injunctions. A party in complying with a mandatory injunction is required to take positive steps and may in the process expend money and effort. A mandatory injunction should not be granted to protect a right having only a limited duration; in such a case the injunction should be limited to the period of the plaintiff's interest in the subject matter of the action.

[7] Section 52 of the Specific Relief Act 1950 enacts that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. It may be granted to prevent a multiplicity of suits and the further harassment of the plaintiff in connection therewith.

[Plaintiff's claim dismissed; defendant's counterclaim allowed; damages to be assessed.]

Cases referred to:

Colwell v. St Pancras Borough Council [1904] 1 Ch 707 ***(cit)***
Day v. Snee 3 Ves & B 170 ***(cit)***
Ellis v. Loftus Iron Co [1874] LR 10 CP 10 ***(refd)***
Entick v. Carrington [1965] 19 St Tr 1030 ***(refd)***
Gregory v. Piper [1829] (b & C 591 ***(cit)***
Gur Pershad v. Khuda Baksh 81 C 687 ***(cit)***
Hegan v. Carolan [1916] 2 Ir R 22 ***(refd)***
Holmes v. Wilson [1839] 10 A & E 503 ***(refd)***
Jackson v. Bunnell 133 NY 216 ***(cit)***
Jasbir Kaur & Anor v. Tharumber Singh [1974] 1 MLJ 224 ***(refd)***
Konskier v. Goodman Ltd [1928] 1 KB 421 ***(refd)***
Kynoch Ltd v. Rowlands [1912] 1 Ch 527 ***(cit)***
Lawrence v. Obee [1815] 1 Stark 22 ***(cit)***
MBf Property Services Sdn Bhd v. Madihill Development Sdn Bhd & Ors [1998] 1 CLJ Supp 110 ***(cit)***
Re Court Hill Canteen [1972] 2 MLJ 257 ***(refd)***
Riggins v. Thompson 74 SW 14 ***(cit)***
Sanders-Clark v. Grosvenor Mansions Co [1900] 2 Ch 373 ***(refd)***
Savory v. Egyption Oil Co [1904] 48 Sol J ***(cit)***
Sedleigh-Denfield v. O'Callaghan [1940] AC 880 ***(cit)***
Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors [1987] 1 MLJ 147 ***(refd)***
Simpson v. Weber [1925] 41 TLR 302 ***(cit)***
Stone v. Bolton [1949] 1 All ER 237 ***(refd)***

Tay Tuan Kiat & Anor v. Pritam Singh Brar [1987] 1 MLJ 276 ***(refd)***
TR Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd [1985] 2 MLJ 45 FC ***(refd)***
Traders Bank v. Wright 17 Man 695 ***(cit)***
Westripp v. Baldock [1938] 2 All ER 779 ***(cit)***

Legislation referred to:
National Land Code 1965, ss. 15(1)(e)(i), 340, 380(1)
Specific Relief Act 1950, s. 52(1), (3)(e)

Other sources referred to:
Halsbury's Laws of England, 4th edn, vol 24, p 595, para 1069
Kerr on Injunctions, 6th edn, p 30

For the plaintiff - S Sagadeva; M/s Saga & Assoc
For the defendant - Andrew Wong Fook Hin; M/s Andrew Wong & Co

Reported by Ling Hea Hoon

JUDGMENT

Abdul Malik Ishak J:

I made a ruling sometime ago that the action be restricted between the present plaintiff and the present defendant without having to cite as 2nd to 5th defendants certain government departments including the Government of the State of Johore. The ruling has since been reduced in writing and circulated to all the parties but unfortunately it was not yet reported. No appeal was also lodged in regard to that judgment. This judgment is a product of a full hearing.

The plaintiff, MBF Property Services Sdn Bhd, were said to be the managers for Asal Gemilang Sdn Bhd and Mega Canggih Sdn Bhd under a power of attorney *vide* no: 39491/93 and had its registered address at 3rd Floor, Wisma MBF, 37C, Jalan Meldrum, 80000 Johor Bahru, Johor. It is not disputed that the defendant was the registered proprietor of a piece of land measuring 178533 square feet held under H.S.(D) 215657, Lot PTD 26138, Mukim Plentong, Daerah Johor Bahru, Johor (hereinafter referred to as the "defendant's land"). The title to the defendant's land has, in the course of the trial, been marked as exh. P7. Pursuant to that power of attorney, the plaintiff became the manager and the lawful attorneys for the registered proprietors of **Zone 1** (which comprised of lands held under PTD 112893 - 112902, PTD 112904 - 112905, PTD 112987 - 11289, PTD 112991 - 112996, PTD 112998 - 113014, PTD 113017 - 113026, PTD 112908 - 112940, PTD 112944 - 112965, PTD 112967 - 112986, PTD 113027 - 113056, PTD 113059 - 113088) and **Zone 2** (which comprised of lands held under PTD 113375 - 113376, PTD 113378 - 113388, PTD 113390 - 113397, PTD 113398 - 113414, PTD 113416 -

113433). Both Zones 1 and 2 which comprised the pieces of lands mentioned therein have been developed by the plaintiff into terrace factories and also factory lots. It was said that both Zones 1 and 2 were categorised as industrial zoning in accordance with the approved site and layout plans approved by the relevant authorities. It was said that in accordance with the layout plans, the plaintiff built a road connecting the two developed zones as access road which had also been approved by the relevant authorities. It is this access road that was root cause of the present suit and of which I have more to say at a later stage. Pursuant to the various sale and purchase agreements signed by the plaintiff, the plaintiff were said to be obliged to maintain the developed properties in the two zones for a period of one year after the certificates of fitness had been issued. Now, the defendant's land was located in between the two zones developed by the plaintiff. Put differently, the defendant's land was sandwiched between the two zones. To enable free access and free flow of traffic between the two zones, the plaintiff conveniently constructed a long stretch of road right across the defendant's land as seen in the photographs marked as "AYH3" of encl. 5 and it can also readily be seen in the bundle of pleadings marked as "A" at pp. 54 and 55 thereof.

The defendant was most unhappy that the access road was built right across the defendant's land on ground level and they took preventive measures thereto. Sometime in January 1996, the defendant through their agents and/or servants barricaded the access road connecting the properties in the two zones by erecting concrete bollards. The defendant's method proved successful as it obstructed access and thorough fare between the developed portions of the two zones. The plaintiff said that the concrete bollards caused undue harship to the purchasers of the properties on both sides of the zones. The defendant said that it was a necessary evil as the concrete bollards would protect the defendant's interest and prevent trespass. It was part and parcel of the defendant's counterclaim that the construction of the access road across the defendant's land by the plaintiff constituted trespass and a nuisance, both of which are still continuing and, consequently, the defendant sought for the following prayers as seen at para. 16 of the counterclaim at p. 17 of bundle "A":

(a) A perpetual prohibitory injunction restraining the plaintiff and/or Asal Gemilang Sdn Bhd and/or Mega Canggih Sdn Bhd and/or their agents and/or their servants and/or their successors-in-title from encroaching and/or using the road across the defendant's land;

(b) A mandatory injunction directing the plaintiff and/or its agents and/or its servants to quit from the road across the defendant's land and to reinstate the defendant's land to its original condition;

(c) Special damages at RM9,341.00 which comprised of RM3,860.00 for erecting the concrete bollards and RM5,481.00 for the cost of the demarcation survey;

(d) General damages, to be divided into two different heads :

(i) damages for trespass and nuisance;

(ii) damages for depriving the defendant of its exclusive use of its own land;

(e) Costs; and

(f) Any other reliefs as the court shall deem fit.

The plaintiff asserted that there were about 35 lots of one-and-a half storey terrace factories, out of which 20 have been sold. There were also 21 industrial lots and out of which 9 have been sold. It was also asserted that all the sold and completed terrace factories have been issued with certificates of fitness for occupation. It was an assertion by the plaintiff that as the certificates of fitness for the completed buildings have been issued by the relevant authorities the plaintiff had no choice but to hand over the premises concerned to the purchasers without further delay under the various sale and purchase agreements entered between the plaintiff and the purchasers.

The plaintiff sought for the following prayers as set out in para. 12 (a) to (d) of the statement of claim as seen in bundle "A". Those prayers were:

(a) a mandatory injunction against the defendant that the defendant do forthwith remove the concrete bollards;

(b) that the defendant be further restrained from obstructing the plaintiff, his agents, servants, purchasers or whosoever the successors-in-title from the plaintiff from having free access and thorough fare through the approved road so built by the plaintiff;

(c) costs; and

(d) any other relief that this Honourable Court deems fit and appropriate.

In the course of the trial, the following facts emerged and they were not disputed by the parties:

(1) The defendant was the registered owner of Lot PTD 26138 - the defendant's land.

(2) There ought to be shown on the issue document of title to the defendant's land the dotted lines running horizontally and vertically as shown and reflected in the approved layout plans marked and exhibited as D14/D11. The defendant conceded that a mistake was made by the appropriate authorities during the issue of the relevant document of title and that at all material times the dotted lines ought to be shown in the site plan endorsed in exh. P7 – the issue document of title of the defendant's land.

(3) The plaintiff was the developer and manager of the industrial properties in the two zones - Zone 1 and Zone 2.

(4) The plaintiff had erected and constructed a tarred road, beautifully done as seen in the coloured photographs in "AYH3" of encl. 5, on ground level along the vertical dotted lines of the defendant's land and had also erected or caused to be erected water rack along the defendant's land. In short, the access road cut across and run through the defendant's land.

(5) The defendant erected concrete bollards on the access road to prevent free flow of traffic between Zone 1 and Zone 2.

Mr. S. Sagadeva, the learned counsel for the plaintiff, pointed out that the main issue in the present case revolved on the question of maintaining the *status quo* of access through an approved road to which the defendant's land was said to be subject to that condition. Mr. Andrew Wong Fook Hin, the learned counsel for the defendant, argued in the opposite direction and it was his stand that the issue for the court to consider was whether the vertical dotted lines on the defendant's land as seen in the approved layout plans in exhs. D14/D11 were in law and in fact a road reserve. If the answer was in the positive then the plaintiff was entitled to erect and construct an access road, on ground level, cutting vertically across the defendant's land. Of course, the plaintiff argued that the answer would be in the positive, while the defendant argued that the answer would be in the negative.

The title to the defendant's land bore several conditions. In its original text, the conditions were:

> Tanah yang terkandung di dalam hakmilik ini hendaklah digunakan semata-mata untuk sebuah bangunan perhentian cum kompleks jenis kekal dibina mengikut pelan yang diluluskan oleh Pegawai Daerah Johor Bahru.
>
> Bangunan Perhentian cum kompleks yang didirikan di atas tanah yang terkandong dalam hakmilik ini hendaklah digunakan semata-mata sebagai Perhentian Cum Kompleks sahaja.
>
> Bangunan Perhentian cum kompleks yang didirikan di atas tanah yang terkandong dalam hakmilik ini, yang digunakan sebagai Perhentian Cum Kompleks hanya boleh digunakan untuk Perdagangan yang bukan Industry dan yang dipersetujukan oleh Pegawai Daerah Johor Bahru.

A sketch plan of the location of the defendant's land was nicely drawn up in the title as seen at exh. P7 and of pertinence would be the legend that reads "M.R.T. CUM KOMPLEKS". The words "SIMPANAN JALAN" (road reserve) also appeared therein. That sketch plan appeared in this format (at p. 73 of bundle "A" – the bundle of pleadings). *[sketch plan omitted from this report]*

The approved layout plans in exhs. D14/D11 showed dotted lines that cut across the defendant's land and for convenience the relevant portion of those plans are reproduced hereinunder. *[layout plan omitted from this report]*

Both the approved layout plans (D14/D11) were prepared by Messrs Jurubena Bertiga International Sdn Bhd for Syarikat Bakland Sdn Bhd. There was nothing to show on the approved layout plans that Lot PTD 26138 belonged to the defendant. Of significance to note would be the portions encircled and coloured in different colours denoting ownerships of the housing projects. Thus, the orange borders clearly described as the area owned by Syarikat Perumahan Lancang Sdn Bhd. The black borders described as the area owned by Malaysia Pacific Development Sdn Bhd. Finally, the green borders which incorporated Lot PTD 26138 – the defendant's land, was described as an area owned by Bakland Sdn Bhd. How could the relevant authorities tell by looking at the layout plans in D14/D11 before approving them to know that in fact Lot PTD 26138 legally belonged to the defendant?

The massiveness of the project undertaken by the plaintiff was clearly explained by Mr. Auw Yang Ho (SP1) in these words:

> When MBf took over the project it was meant for a light industrial factory for the whole scheme. This project is situated at Plentong area, its along the Pasir Gudang Highway. This project has been completed. There are altogether 444 factories plus 72 numbers of vacant lands for factories.

It was mentioned earlier that Bakland Sdn Bhd was described as the owner of the land in green borders as seen at the approved layout plans in D14/D11. Now, SP1 explained that:

> These lands were originally purchased from Bakland Sdn Bhd. The company who bought it was Asal Gemilang Sdn Bhd.

and since the plaintiff managed Asal Gemilang Sdn Bhd it naturally followed that it was the plaintiff that developed that massive project. This was not disputed at all by the parties. SP1 had the audacity to say that when the plaintiff took over the project he was not aware that the defendant owned Lot PTD 26138. SP1 testified that at the material time MBf property and himself knew that Lot PTD 26138 was earmarked for MRT ie, mass rapid transit. SP1 continued in this vein:

> The whole chunk of PTD 26138 is the MRT station and the dotted horizontal lines on PTD 26138 were meant for MRT lines.
>
> The vertical dotted lines on PTD 26138 are the road reserves and on this portion MBf has since built a tarred pre-mixed road on it. This tarred/pre-mixed road served as an access to the development at the bottom part as shown in P3.

> If this access road is blocked the people at the bottom portion will not have access to go to the top portion and *vice versa*. The road near the Sekolah Rendah is not constructed as yet.

SP1 further testified that:

> The position of the road is exactly constructed as shown on the vertical dotted lines on PTD 26138.

Unfortunately, this assertion by SP1 do not tally with the title of the defendant's land as shown at p. 73 of bundle "A". In fact, the approved layout plans in D14/D11 as seen in the early part of this judgment clearly showed that the access road was constructed along the dotted lines.

From the tenor of the evidence of SP1 and Mr. Adib Azhari bin Daud (SP2) the Deputy Registrar of land titles attached to the office of the Lands and Mines, Johor Bahru, the plaintiff's case seemed to rely on exhs. P2, P3/D9 and P4 as authoritative plans evidencing approval of a road reserve, on ground level, along the vertical dotted lines on the defendant's land, and flowing from this, the plaintiff held onto the notion that they had the right to erect and construct the disputed access road. During examination-in-chief, the tenor of SP1's evidence seemed to be that as far as the plaintiff was concerned the erection and construction of the access road was in accordance with the approved plans as seen in exhs. P2, P3/D9 and P4. But under cross-examination, SP1 testified that:

(1) exhibit P2 was merely an approval for an amendment to an original layout plan;

(2) that the defendant's land - lot PTD 26138 was not mentioned at all in exh. P2;

(3) that exhs. P3/D9 were merely an approved amendments to an original layout plan;

(4) that the defendant's land - Lot PTD 26138 was not mentioned at all in the legend on exhs. P3/D9;

(5) that in exh. P4 and the cover letter approving the said exhibit which was issued by the Majlis Daerah Johor Bahru Tengah did not mention at all about Lot PTD 26138; and

(6) that the plaintiff had committed trespass on the defendant's land.

In my judgment, there was nothing spectacular about SP1's evidence. It was not controversial at all. In fact, it was beneficial to the defendant in that, in no uncertain terms, SP1 said that the plaintiff had trespassed onto the defendant's land. In simple language, trespass to land is an unjustifiable intrusion by one person upon the land in possession of another. In *Hegan v. Carolan* [1916] 2 Ir. R 22 "trespass" was defined widely in these words:

> Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show *cause quare clausum querentis fregit*. For every man's land is in the eye of the law enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field.

Coleridge CJ in *Ellis v. Loftus Iron Co* [1874] LR 10 CP 10 defined the word "trespass" strictly:

> If the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.

It appears that the slightest crossing of the boundary is sufficient to constitute trespass. Examples of trespass are abound in the law books and they grow by the day. It is trespass to place anything on or in the land which is in possession of another, and it is also trespass if a person drives a nail into the wall of his neighbour (*Lawrence v. Obee* [1815] 1 Stark 22; and *Simpson v. Weber* [1925] 41 TLR 302). It is also trespass if one places rubbish against the wall of his neighbour (*Gregory v. Piper* [1829] 9B & C 591; and *Kynoch, Ltd v. Rowlands* [1912] 1 Ch. 527). Trespass is also said to occur if one grows creeper up his neighbour's wall (*Simpson v. Weber (supra)*) or even to prop a ladder against the wall of his neighbour (*Westripp v. Baldock* [1938] 2 All ER 779 which was subsequently affirmed on appeal *vide* [1939] 1 All ER 279).

It is wrong to assume that no one can be liable for trespass unless he has notice that he is trespassing. The trespasser is liable whether he knows that he is trespassing or that he does not know that he has no right in law to be there. The notice is relevant in so far as it may aggravate damages and it is an intergral part of the defendant's line of defence. It is a correct statement of the law to say that trespass is actionable per se without any proof of special damage. An old classical case lays down the proposition that:

> Every invasion of property, be it ever so minute, is a trepass.

and that classical case is non other than *Entick v. Carrington* [1765] 19 St. Tr. 1030, 1066. Be that as it may, SP1 testified that the vertical dotted lines indicated the "road reserves" on which the plaintiff had constructed the access road but this cannot be so since in exh. P3 there was no road reserve (actual words used were "simpanan jalan") cutting across the defendant's land. It was submitted that SP1 said that the road in dispute was constructed in exactly the same way as in the layout plan that was approved and in support of that submission reference to exhs. D14 and P3 were made. But alas, this submission was misleading to say the least for the simple reason that exhs. D14/D11 had not even been brought to the court's attention when SP1 was in the witness box. Moreover there was a categorical admission by SP1 that there was no road reserve on Lot PTD 26138 – the defendat's land, simply by referring to exhs. P3/D9. It was also submitted that SP1 had confirmed that exh. P4 was the road and drainage plan that was approved by the Majlis Daerah Johor Bahru Tengah and that plan also showed that the road across the defendant's land was part and parcel of the approval. With respect, this submission overlooked the fact that SP1 was not the approving body and was therefore not in a position to confirm that assertion. It must be borne in mind that there was an admission by SP1 that the defendant's land was not mentioned at all in exh. P4.

In regard to the testimony of SP2, the entire examination-in-chief was focussed on exhs. P3/D9. No other plans were referred to SP2 in highlighting the road in dispute. It was SP2's testimony that the yellow colouring in exh. P3 indicated "simpanan jalan dan lorong, laluan MRT dan lapangan letak kereta." According to SP2 "mengikut kelaziman garisan yang putus-putus yang terdapat di PTD 26138 adalah laluan jalan dan juga laluan MRT." SP2 even said that there was no necessity to colour the dotted lines. SP2 testified that the mistake mentioned in exh. P6 was that the sketch plan annexed to the title of the defendant's land in P7 was entirely different from the approved layout plan. That difference was said to be the absence of dotted lines on the sketch plan annexed to the title of the defendant's land in accordance with plan perancang J7/02/PT/10/12/90/P1-92 – it must be noted that these very plans were marked at cross-examination stage as exhs. D14/D11. SP2 further testified that the Pejabat Tanah dan Galian had issued a statutory Form 2B notice to the defendant but the latter did not respond at all.

During cross-examination, the testimony of SP2 went like this. That as far as exhs. P3/D9 were concerned there was no yellow colouring on the title to the defendant's land. That at the top left hand columns of exhs. P3/D9. The defendant's land was not listed to be involved in the approved amendment to the layout plan. SP2 was more categorical when he said that the defendant's

land "langsung tidak terlibat di dalam pindaan layout." SP2 agreed that there were four relevant layout plans material and relevant to the issue of the road in question and these plans were said to be exhs. D13, D10, D14/D11 and P3/D9. SP2 also testified that the defendant's land was not involved in the various proposed amendments to the layout plans as shown in exhs. P3/D9, D10 and D14/D11. In regard to the statutory notice in Form 2B, SP2 confirmed that on 21 March 1996 the PTG's office received a letter dated 20 March 1996 from the defendant's agent, Kemayan Management Services Sdn Bhd informing the PTG's office that the issue document of title relating to the defendant's land was, at the material time, in the possession of the PTG's office for the purpose of a registration of a charge. It seemed that the mistake on the sketch plan annexed to the title of the defendant's land was that it was different from the approved layout plan. That difference was this – there were no dotted lines in the sketch plan annexed to the title of the defendant's land like the ones as found in exhs. D14/D11. That the area governing the defendant's land in exh. D13 was not the same as that shown in exhs. D14/D11. SP2 also testified that no title would be issued for a road reserve unless an individual or a company applies for the same to be alienated and such application would then be approved by the State Authority. In relation to exhs. D14/D11, the State Authority would not issue titles for the road reserves shown therein. According to exhs. D14/D11, the State Authority approved two plots of land for MRT complex. A vital question was posed to SP2 under cross-examination. It was worded in this way:

> Jika garisan putus-putus itu untuk laluan jalan dan laluan MRT mengapa tidak disambungkan dengan garisan yang penuh?

SP2 replied that it could be due to various possibilities, namely:

(1) Garisan putus-putus ini tidak disambung terus oleh kerana kawasan ini tidak terlibat dengan pindaan sebagaimana di dalam P3/D9.

(2) kemungkinan adanya cadangan pembinaan reserved jalan dan laluan MRT sama ada bawah tanah atau pun atas tanah.

(3) Ada kemungkinan garisan putus-putus ini tertakluk kepada keadaan-keadaan yang tertentu yang telah diluluskan oleh Majlis Mesyuarat Negeri Johor.

It was submitted that SP2 confirmed that exhs. P3/D9 was an approved plan by Hasil Bumi. This assertion by SP2 must also be viewed by the confirmation of SP2 to the court that the defendant's land was absolutely not involved in the amendment as shown in exhs. P3/D9. That being the case exhs. P3/D9 were irrelevant and immaterial as far as the plaintiff's case was concerned. It was also submitted that SP2 categorically confirmed that the title to the

defendant's land did not have the dotted lines as road reserves particularly in the sketch plan annexed thereto. It was said that SP2 confirmed that the decision of the State Authority was to allocate both a road reserve and an MRT on the defendant's land. A counter rebuttal to this submission was to the effect that the absence of the dotted lines on the sketch plan annexed to the title of the defendant's land had earlier been conceded by the defence. But it was sought to argue that the important factor for consideration was the meaning to be attached to the dotted lines. In one breath SP2 was able to say that that the dotted lines were intended as a road reserve as well as an MRT reserve. In another breath, SP2 saw it fit to say that there was a possibility of a proposal for construction of the road or the MRT line, below ground level or above ground level. The submission by the plaintiff's counsel that SP2 had stated that the defendant's land was part and parcel of the development area submitted for approval was met by a counter submission that that was an incorrect assessment of the evidence. It was submitted in rebuttal that SP2 had categorically stated that the defendant's land "tidak langsung terlibat dengan cadangan pindaan layout sepertimana P3/D19, D10 dan D11."

It is interesting to note that SP2 was a cautious witness. He had nothing to gain nor lose by testifying at this trial. He was alert and when pushed to a tight corner, so to speak, was able to extricate himself rather well. However, it must be emphasised that SP2's evidence on the possibility that the defendant's land can be cut into four lots cannot be readily accepted in the light of the evidence that the State Authority had only approved two plots of land for MRT complex, one of which was the defendant's land. The magnitude of this point can be appreciated if one bears in mind the evidence of Pagavathy @ Patmathevy (SD4) when she told the court that the defendant's land was intended to be developed as one plot right from the very beginning. It was argued that the evidence of SP2 was corroborated by SD4. This was a misconception. Indeed SD4 did say under cross-examination that exhs. D14/D11 showed that the MRT and the road will pass through the defendant's land. But it must be noted that just before that SD4 did say, under cross-examination, that the defendant's land "was however intended as one plot right from the beginning because it was held under one title all the way." SD4 also did say that the MRT and the road will pass through on ground level. From this brief recital of SD4's evidence it was clear that her evidence did not corroborate that of SP2. Another facet to the evidence of SP2 was this. The submission that SP2's evidence that the dotted lines could possibly indicate that the proposed road could be constructed above or below ground level at once shattered completely the plaintiff's contention that the vertical dotted lines on the defendant's land entitled the plaintiff to erect and construct a road on ground level cutting vertically across the defendant's land.

Finally, I will now proceed to examine the evidence of Md. Yunos bin Mahmood (SP3), the technical assistant from the Majlis Daerah Johor Bahru Tengah.

In essence, under examination-in-chief, SP3 testified that exh. P4 was a plan approved by the relevant local authority. Under cross-examination, SP3 testified that only the registered proprietor of a piece of land or the qualified consultants engaged by the registered proprietor may submit earthworks, roads and drainage plans to be approved by the local authority. SP3 also testified that the defendant's land was not included in the plan mentioned in exh. P16 and that exh. P4 was submitted by Mega Canggih Sdn Bhd. Somehow SP3 did not know that Lot PTD 26138 was not the property of Mega Canggih Sdn Bhd. To SP3 a road reserve must be coloured yellow but in exhs. P3/D9 no yellow colouring was seen coloured across the defendant's land.

A submission was advanced on behalf of the plaintiff that the evidence of SP3 corroborated that of SP2 particularly when SP2 testified that on the sketch plan to the title of the defendant's land it showed the existence of a road reserve as well as a reserve for MRT. But this piece of evidence was nullified when SP2 testified that it was possible for the road passing through the defendant's land to be built either above ground level or below ground level. It was submitted that SP3 did say that his department had approved the road and the MRT on the defendant's land and, consequently, the issue of constructing the access road had been resolved. With respect, the submission cannot hold water. In my judgment, SP3's department should not have approved the road and the MRT on the defendant's land for two cogent reasons. Firstly, the defendant as the owner of Lot PTD 26138 had not submitted any plans for earthworks, roads and drainage. It must be recalled that SP3's department did not even know that Lot PTD 26138 did not belong to the applicant who submitted exh. P4 for approval. Secondly, it was apparent from the tenor of SP2's evidence and that of SD4 that SP3's department had wrongly assumed that the vertical dotted lines along Lot PTD 26138 was a road reserve on the ground level.

The peculiarity about the present case was that the whole case hinged on the way the technical drawings have been interpreted. Both sides meticulously and tediously elicited from witnesses the various procedures an applicant has to go through in order to obtain an approval for the development of the lands in the State of Johor. At the end of the day, it was the Hasil Bumi and the Majlis Mesyuarat Kerajaan ("MMK") that had the final say. In fact, everything depended on the decision of the MMK. It follows that what SP3 said must be read with this caveat. That SP3's department must follow and conform to the MMK's approval when the department approved the earthworks, roads and

drainage plans cannot be doubted. Thus, SP3's department cannot approve the construction of a road on ground level on the defendant's land willy nilly without, firstly, an application being filed by the landowner and, secondly, an approval by the MMK or the State Authority.

I will now proceed to examine the defendant's case. At the outset, it is pertinent to point out that the testimonies of Lim Tong Soon (SD1) and Wong Chin Vew also known as David Wong (SD2) to the effect that the defendant became the registered owner of Lot PTD 26138 on 18 August 1995 was not disputed. The defendant had purchased Lot PTD 21638 from Air Terang Sdn Bhd. As the facts unfolded, it was apparent that the defendant had entered into a joint venture profit sharing agreement with Kemayan Land Sdn Bhd and accordingly had granted a power of attorney to Kemayan Land Sdn Bhd in respect of Lot PTD 26138. Under that joint venture profit sharing agreement, Kemayan Management Services Sdn Bhd was appointed the project manager. SD2 became aware that the road was constructed on ground level cutting across the defendant's land sometime in December 1995 and without further ado he quickly put up concrete bollards across the road within the boundary of the defendant's land so as to prevent trespassing onto the said land. In my judgment the plaintiff trespassed into the defendant's land. The plaintiff knew that they had trespassed and in law every continuance of a trespass is a fresh trespass and in respect of which a new cause of action arises from day to day so long as the trespass continues and persists. This is in fact actually happening in the present case. Up to this very day, the trespass by the plaintiff is continuing and it will remain unabated. In *Holmes v. Wilson* [1839] 10 A & E 503, where the defendant built on the plaintiff's land some buttresses to support a road and paid damages in an action for trespass was held liable in damages in a second action for not removing the buttresses after notice. In *Konskier v. Goodman, Ltd* [1928] 1 KB 421 the facts were that a builder while demolishing a building left rubbish on the roof of an adjoining building and as a result of which a gully became choked and the adjoining building became flooded. It was held that the builder was liable to the tenant of adjoining building even though the tenancy had only commenced after the building operations had finished.

The construction of the access road on the defendant's land for the convenience of the purchasers in both zones constituted, in law, a nuisance. The essence of nuisance is the undue interference with the use and enjoyment of the land. If was said in *Sanders-Clark v. Grosvenor Mansions Co.* [1900] 2 Ch. 373 that "the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that decomposes or injuriously affects the senses or the nerves" would be a nuisance. It is prudent to remember that in determining the crucial question of whether a nuisance has been caused,

one must endeavour to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the plaintiff to the undisturbed enjoyment of his property. This test was laid down by Lord Wright way back in 1940 in the case of *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880 at p. 903. Of course, there can be no precise or universal formula, but a useful test would be what is reasonable according to the ordinary usages of mankind living in a particular society. Oliver J in *Stone v. Bolton* [1949] 1 All ER 237 at pp. 238 to 239 rightly said:

> Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of; the place of its commission, the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasioned or continuous; so that the question of nuisance or no nuisance is one of fact.

On the facts there was nuisance occasioned by the plaintiff onto the defendant. That nuisance was permanent in nature as the plaintiff contemplated the access road built on the defendant's land to service the purchasers of both zones. The access road was not made of gravel but it was tarred and pre-mixed as shown in the coloured photographs. There was permanency to that access road. Reverting back to the facts of the present case, by letter dated 8 March 1996, SD2 wrote to the land office at Johor Bahru requesting for confirmation as to whether there was indeed a road cutting across the defendant's land. That letter dated 8 March 1996 has since been tendered and marked as exh. D21 and for brevity it is reproduced hereinunder:

KEMAYAN
MANAGEMENT SERVICES
SDN BHD.

Our Ref: KMS/CPP/RA/139/96

Date : 08.03.1996

Pejabat Tanah Daerah Johor Bahru,
Johor Bahru,
Johor.

(U/P : En. Paing Bin Sikin

PERKARA: HS(D) 215657 LOT PTD 26138, BANDAR BARU KOTA PUTRI, MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR.

Merujuk kepada perkara di atas, kami sebagai pengurus projek Madihill Development Sdn Bhd meminta pihak tuan mengesahkan bahawa tiada terdapat sebarang jalan di atas Lot PTD 26138 Bandar Baru Kota Putri, Mukim Plentong, Daerah Johor Bahru, Johor buat masa ini.

Pihak kami berharap agar tuan dapat mengesahkan perkara di atas dengan secepat mungkin dan perhatian daripada pihak tuan amat kami hargai.

... Bersama-sama ini kami sertakan bersama salinan Surat Hakmilik untuk rujukan tuan.

Terima kasih.

Yang benar,

Sgd (Illegible)
DAVID WONG
PENGURUS PROJEK.

The prompt reply from the land office at Johor Bahru reflected the efficiency of that department and that reply was favourable to the defendant. The reply was that there was no "simpanan jalan yang merentasi di atas tanah tersebut" and that reply was marked as D22. A reproduction of D22 is appropriate at this juncture:

PEJABAT PENTADBIR TANAH DAERAH,
PETI SURAT 38,
80700 JOHOR BAHRU.

Ruj.Tuan: KMS/CPP/RA/139/96
Ruj.Kami: ( )dlm PEN. 12/96
Tarikh : 12hb Mac, 1996

Pengurus Madihill Development Projek,
d/a Kemayan Management Services Sdn Bhd,
No.2, Jalan Dian 8,
Taman Munshi Abdullah,
81200 Johor Bahru.

HS(D) 215657 PTD 26138 BANDAR BARU
KOTA PUTRI, MUKIM PLENTONG, JOHOR BAHRU

Berhubong dengan perkara di atas, merujuk surat tuan bertarikh 8 Mac 1996 adalah disahkan bahawa tanah yang berdaftar dengan hakmilik HS(D) 215657 PTD 26138 Mukim Plentong tiada terdapat simpanan jalan yang merentasi di atas tanah tersebut.

2. Kedudukan simpanan jalan adalah sebagaimana yang tertera di atas pelan dalam hakmilik tersebut.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Sgd (Illegible)
(AMINAH BTE HASHIM)
PENTADBIR TANAH,
JOHOR BAHRU.

Now, the letter at D22 sealed the fate of the plaintiff forever. Even the plaintiff admitted that the access road was constructed across the defendant's land. This admission can also be seen at para. 7 of the defence to the counterclaim in encl. 23. Mr. Mohammed Ridha bin Abdul Kadir (SD3), the Penolong Pentadbir Tanah, Pejabat Tanah, Johor Bahru testified that exh. D22 emanated from the land office in Johor Bahru as a reply to exh. D21. Credit should go to Mr. S. Sagadeva for being very magnanimous thoughout the trial and having agreed to mark the exhibits as they were presented to the witness. The trial proceeded with cordiality all round. Be that as it may, SD3 further testified that by looking at exh. P6 it would be apparent that that letter would have been copied to the office of the land office at Johor Bahru. SD3 however was unable to confirm whether a copy of exh. P6 was indeed received by the land office at Johor Bahru. Under cross-examination, SD3 testified that before D22 was sent out, the matter had been investigated by the relevant officers.

SD4 was the last witness for the defendant. As a Penolong Pegawai Perancang, SD4 was the best candidate to testify for the defendant. She was a senior officer and very familiar with the State approval procedures in regard to the development of lands in Johor. According to SD4, the chronological order for the four plans that were shown to her would be in this order:

- D13 approved on 22.1.1990.
- D10 approved on 31.12.1990.
- D14 does not have a date written by the Pengarah but the plan number referred to is 1992. It is a conditional approval and not a final approval.
- D9 does not have a date on the signature. I say it was approved on December 1993.

SD4 further testified that D13 was only a concept plan. In D13 there was a proposal for an MRT station but the exact location was not determined except that the alignment of the MRT was shown. According to SD4, exh. D10 was approved subject to certain conditions and that those conditions have been transmitted to the owner and later D14 was approved. SD4 was quite

categorical when she said that between the period stipulated in D10 and that of D14, the number of units approved for the "perhentian cum kompleks" remained the same – only two. SD4 further testified that exhs. P3/D9 were approvals not in relation to the defendant's land but rather it was meant for the MRT and the intended road connection between the two lots as shown in the dotted lines. These were said not to be intended for immediate development. Under cross-examination, SD4 stood her ground. She reiterated that as far as exhs. P3/D9 were concerned, there was no colouring on the defendant's land and this meant that the defendant's land was not intended for development at that time. Under re-examination, SD4 testified that the defendant's land was intended to be one plot from the very beginning and SD4 was quite categorical and even bordering on bluntness when she said that by looking at the layout plans, no one could tell the elevation of the defendant's land. She continued to say that when the design of the MRT in the future was developed, the design may be underground, above the ground etc, without cutting across the defendant's land on the ground. It is interesting to note that SD4 did say that by looking at the plan in relation to the defendant's land, the relevant authorities have no ideas as to how the MRT station would look like and how the roads would link from one end to the other end. This was a startling revelation. It boggles the mind that the Jabatan Perancang was totally in the dark about MRT concept way back in 1979. Of pertinence was SD4's testimony to the following effect, which surely gave mileage to the defendant:

> In other words the Jabatan Perancang will only know the level of the MRT line and the type of road that would pass through PTD lot 26138 once the owner has submitted the relevant plans for the MRT station to be built by the owner and submitted to the relevant authorities for approval.

On the facts of the present case, I am in agreement with Mr. Andrew Wong Fook Hin that the only issue for determination would be: Whether the vertical dotted lines on Lot PTD 26138 is in law and in fact a road reserve for a road to be built on ground level cutting vertically across the said Lot? SP2 gave four versions to the question. Firstly, he testified that the dotted lines indicated a road reserve and an MRT reserve. Secondly, SP2 gave another version and this version comprised of three different facets which had been referred to in the early part of this judgment. SP3 on the other hand explained that the dotted lines were meant for three different usages, namely :

(1) reserve MRT;

(2) road reserve; and

(3) MRT station.

While SD4, the experienced officer from the planning department, categorically stated that the dotted lines were "not intended for immediate development."

Mr. Andrew Wong Fook Hin ingeniously submitted that the only conclusions that can be arrived at from the testimonies of SP2, SP3 and SD4 would be:

(1) eventually, the two ends of the vertical dotted lines will be connected but whether the vertical road will run on the ground level or above ground level or below ground level will be subject to the approval of the relevant authorities when the registered owner of Lot PTD 26138 ie, the defendant submits its plans for the development of the MRT cum complex.

(2) similarly, eventually, the two ends of the horizontal dotted lines will be connected but whether the horizontal MRT line will run on the ground level or above ground level or below ground level will be subject to the approval of the relevant authorities, when the registered owner of Lot PTD 26138 ie, the defendant, submits its plans for the development of the MRT cum complex.

There was evidence emanating from SD4 that upon submission by the defendant to develop Lot PTD 26138 in the near future the manner in which the level of the MRT line and the type of road that would pass through the defendant's land would be known. For the time being, it was pure and simple conjecture to argue that the road through the defendant's would be on the ground level. One thing for sure is this: The access road cut across the defendant's land as admitted by the plaintiff. That would be trespass. And since it interfered with the defendant's use and enjoyment of Lot PTD 26138 it was a nuisance. This was my judgment and I so hold accordingly.

Exhibit D22 sided the defendant all the way. In exh. D22 there was an assertion by the land office in Johor Bahru that there was no road cutting across the defendant's land. If that being the case how could this court allow that access road built on the defendant's land to remain. A minute invasion would be sufficient to constitute trespass (*Entick v. Carrington (supra)*). Here, the invasion was not minute. It was massive. The defendant through SD2 saw the necessity to erect concrete bollards to prevent the trespass and by necessary inference to abate the nuisance. Even the approved layout plans in D14/D11 did not show that Lot PTD 26138 belonged to the defendant. There was no colouring on Lot PTD 26138 in the approved layout plans of D14/D11 and as the witness said it was not earmarked for development. Incidentally, s. 380(1) of the National Land Code 1965 ("NLC") empowers the Registrar to make such corrections as may be appropriate in the circumstances of the case. A form 2B notice was issued to the defendant under s. 15(1)(e)(i) of the NLC – this section empowers the State Director, the Registrar and any Land Administrator to require any person or body to produce for inspection any document of title, in his possession and take copies of or extracts from any

such document. Through SD2 it was shown that the defendant had by letter dated 20 March 1996 and received by the Registrar on 21 March 1996 informed the Registrar that the issue document of title was with the Registrar's office for the purpose of registering a charge. That being the case, the Registrar was therefore at liberty to inspect, take copies of or extracts the same. It can also be said that the Registrar had more than ample opportunity to make such corrections to the title of Lot PTD 26138 as may be appropriate. A passage from the judgment of Peh Swee Chin J (now FCJ) in *Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147 was referred to and this was what his Lordship said:

> Though it is a truism to say that land or possession of land is inviolate, it is the first principle to be borne in mind here. Any interference or invasion of it is only tolerated on impeccable grounds.

And flowing from it Mr. Andrew Wong Fook Hin submitted that the principle of inviolateness of land was the paramount consideration in the determination of the issue before this court. It was his submission that the portion of land within the dotted lines had been shown not to be a road reserve on ground level and was the property of the defendant, whose title or interest to the land thereto was said to be indefeasible and inviolate. Now, it is trite law that the basis of the Torrens system is the registration of title. The title to Lot PTD 26138 was held, at the material time, by the defendant and that was the conclusive evidence of the ownership of the land. The defendant being the registered proprietor, in law, is said to have a title which cannot be impeached, challenged, questioned or struck down. As the registered proprietor the defendant was said to be immune from adverse claims. But indefeasibility is not absolute because under certain circumstances a registered title or interest may be set aside or defeated by one with a better claim. Section 340 of the NLC sets out the circumstances under which a title will be rendered defeasible in the hands of a registered proprietor. For the present exercise, these circumstances are of no concern as the defendant's title to Lot PTD 26138 was not challenged by the plaintiff. But I need to say that the indefeasibility rule only applies when the purchaser has registered his transfer and his own name is registered in the register document of title so that he will become, in law, the registered proprietor of the land. It follows that the indefeasibility rule does not apply when the memorandum of transfer has been executed but not registered. This was the view adopted by the then Federal Court in *Jasbir Kaur & Anor v. Tharumber Singh* [1974] 1 MLJ 224 when it observed at p. 228 of the report:

> Under that (Torrens) system as has been held in the Courts in Australia and New Zealand it is the official act of registration and not the execution and delivery of the dealing or instrument, which creates or assigns the estate.

As can be seen from the pleadings both parties sought for mandatory injunctions. Simply put, a mandatory injunction is based on a final determination of the rights of the parties and is permanently to prevent infringement of those rights and obviate the necessity of bringing action after action in respect of such infringement. By their very nature, mandatory injunctions have more serious consequences on the parties than interlocutory injunctions. Thus, a party in complying with a mandatory injunction is required to take positive steps and may in the process have to expend money and effort. The mandatory injunctions that both parties sought for have irreversible consequences and for the defendant it would certainly maintain the *status quo.*

The Americans regard a mandatory injunction as one granted after trial and which finally disposes of the injunction suit: *Jackson v. Bunnell* 133 NY 216: 21 NE 79. It forms part and parcel of the judgment upon a hearing on the merits (*Traders Bank v. Wright* 17 Man 695), and it can properly and legally be ordered after the final judgment (*Riggins v. Thompson* 74 SW 14; and *Day v. Snee* 3 Ves & B. 170).

In England, the law is the same. *Kerr on Injunctions*, 6th Edn at p. 30 had this to say:

> After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial.

The same is also true for the present defendant here who sought for that mandatory injunctions in their counterclaim. No laches were pleaded by the parties and non-existed and there was no need to consider this point. A perpetual injunction is conclusive in nature. The jurisdiction to grant a mandatory injunction is founded on equity of relieving a party from the necessity of bringing action after action, as I said earlier, for every violation of a right. It is said that a mandatory injunction should not be granted to protect a right having only a limited duration; in such a case it is said that the injunction should be limited to the period of the plaintiff's interest in the subject matter of the action (*Savory v. Egyption Oil Co.* [1904] 48 Sol J 573 and *Colwell v. St. Pancras Borough Council* [1904] 1 Ch. 707).

Section 52(1) of the Specific Relief Act 1950 enacts that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. It is also said that it may be granted not to prevent a multiplicity of suits and the further harassment of the plaintiff in connection therewith (*Gur Pershad v. Khuda Baksh* 81 C 687). But with respect *Gur Pershad's* case should be read in the context of our

s. 52(3)(e) of the Specific Relief Act 1950 where it enacts that where the injunction is necessary to prevent a multiplicity of judicial proceedings a perpetual injunction may be granted. Surprisingly s. 52(3)(e) of the Specific Relief Act 1950 gives the court the power to grant a perpetual injunction "when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property." Here, on the facts it was the plaintiff that invaded the defendant's right to the enjoyment of Lot PTD 26138 by constructing an access road right across the defendant's land, on ground level. Here the act of the plaintiff was of such a character that it must inevitably result in injury to the defendant. Under English law, the right to an injunction is a *prima facie* right, and any person who has sustained material injury is entitled to it. Here, the defendant sustained injury. I may add that the defendant was entitled to a mandatory injunction restraining the plaintiff and/or Asal Gemilang Sdn Bhd and/or Mega Canggih Sdn Bhd and/or their agents and/or their servants and/or their successors in title from constructing the access road, encroaching and/or using the access road across the defendant's land and, consequently, the plaintiff must reinstate the defendant's land to its original condition.

In *Tay Tuan Kiat & Anor v. Pritam Singh Brar* [1987] 1 MLJ 276, trespass was in issue when the retaining wall and structure encroached on the plaintiff's land and Thean J had this to say at p. 278 of the report:

> The second relief asked for is an order that the defendant do pull down and remove the retaining wall and erect a new wall in place thereof but within the boundary of the defendant's land. It is in effect a mandatory injunction and the question is whether it should be granted in this case. 'The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course.' Every case must depend essentially upon its own particular circumstances.' (per Lord Upjohn in *Redland Bricks Ltd v. Morris and Anor* [1970] AC 652, 665). This is a general principle, and I now turn to consider the circumstances of this case.

Raja Azlan Shah J (as His Majesty then was) in *Re Court Hill Canteen* [1972] 2 MLJ 257 observed:

> I think the law is very clear. A perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail. There is another point. One can bring an action for perpetual injunction before filing a writ of summons in the case of urgency. This is clear from the case of *L. v. L.* [1969] 1 All ER 852.

Halsbury's laws of England, 4th Edn, Vol. 24, p. 595, para. 1069, under the heading of Form of Mandatory Injunction reads:

> It was formerly the practice of the Court of Chancery to word mandatory injunctions in an indirect prohibitory form, but now all such injunctions should be worded in the direct mandatory form, such as directing buildings to be pulled down and removed. There is now no distinction in principle between the negative and the position form ...

Lee Hun Hoe CJ (Borneo) in *T.R. Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd* [1985] 2 MLJ 45 FC said at p. 55 of the report:

> The grant of a mandatory injunction is entirely discretionary. Every case must depend essentially upon its own particular circumstances. It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitantly. When the court decides to grant such an injunction then the court must see to it that that person against whom it is granted knows exactly what he has to do. In might be of interest to refer to *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228 where their Lordships of the Privy Council stated that it would not interfere with the exercise of the discretion by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

On the factual matrix of the present case, I have no hesitation in granting the mandatory injunctions sought for by the defendant.

The defendant has indefeasibility of title. The defendant has immunity from attack by adverse claim and has the right to quiet enjoyment of Lot PTD 26138.

The plaintiff has no right to trespass and create a nuisance by constructing that access road at ground level. For these and the other reasons adumbrated in this judgment the plaintiff's claims were dismissed with costs. The defendant's counterclaim was allowed with costs. The damages accruable to the defendant, be it special and general, to be assessed forthwith by the Senior Assistant Registrar.